



## **Case Summary**

Appellant-Defendant Cynthia Williams (“Williams”) appeals the trial court’s order that she serve her previously suspended sentence. We affirm.

## **Issues**

Williams raises two issues on appeal, which we restate as:

- 1) Whether there was sufficient evidence to find that Williams violated her probation, and
- 2) Whether the trial court had statutory authority to order execution of the previously suspended sentence.

## **Facts and Procedural History**

During the summer of 2001, Williams took \$8321 in cash from a gas station where she worked. In 2002, the State charged her with Theft, a Class D felony.<sup>1</sup> Williams pled guilty. On March 26, 2003, the trial court sentenced her to the maximum term of imprisonment, 1095 days (three years), with all but twenty of those days suspended.<sup>2</sup> Further, the trial court placed Williams on probation for two years, on the condition that she pay fees and restitution, not consume any illegal drug, and communicate truthfully with her probation officer.

After her probation had expired, the probation department moved for Williams to be “unsuccessfully discharged.” Appendix at 5. The trial court denied the motion based upon “the amount of unpaid restitution,” and requested the State to file a Notice of Violation. Id. at 64. The State so moved, alleging only non-payment. While Williams had paid nominal

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<sup>1</sup> Ind. Code § 35-43-4-2(a).

<sup>2</sup> I.C. § 35-50-2-7.

amounts toward the costs, fees, and restitution, she still owed approximately \$8609. On October 12, 2005, the parties submitted and the trial court accepted an amended agreement, in which Williams admitted to non-payment. The trial court reinstated her probation until April 12, 2006, and ordered her to serve twenty days imprisonment.

Back on probation, Williams submitted urine samples on December 29, 2005 and May 10, 2006. Between submitting those two samples, Williams had written the trial court, indicating that she was “drug free.” Id. at 81. Based upon both samples, the State filed Notices of Violation alleging that she violated the terms of her probation by using cocaine and denying her drug use when questioned by her probation officer.

On August 16, 2006, the trial court heard evidence regarding the alleged violations. The State submitted affidavits of a toxicologist, concluding that Williams had consumed cocaine within seventy-two hours of both tests. Because her probation officer was male, two female probation officers observed Williams provide the samples. The officer who observed the first sample did not testify. The other officer testified that she observed Williams submit the second sample. She stated that Williams knocked the entire sample onto the floor, that Williams urinated again, and that the sample was adequate for testing purposes.

Williams acknowledged giving the samples, but testified to irregularities with both collection procedures. Regarding the first test, she testified that, contrary to routine, the sample was not placed in a freezer. As to the second test, she testified that the sample spilled, but that a small amount of urine remained. She denied that she had been able to

urinate a second time after the sample was spilled.

The trial court found Williams to have committed the conduct alleged in both Notices of Violation. The trial court revoked her probation and ordered her to execute 360 days imprisonment that had been previously suspended. Williams now appeals.

## **Discussion and Decision**

### **I. Sufficiency of the Evidence**

When reviewing the sufficiency of the evidence in a probation revocation proceeding, we apply the same standard used in any other sufficiency question. Garrett v. State, 680 N.E.2d 1, 2 (Ind. Ct. App. 1997) (citing Bryce v. State, 545 N.E.2d 1094, 1099 (Ind. Ct. App. 1989), trans. denied). We will not reweigh the evidence or assess the credibility of witnesses. Robinson v. State, 699 N.E.2d 1146, 1148 (Ind. 1998). Rather, we consider only the evidence that supports the revocation, and draw all reasonable inferences from that evidence. Id. The State must prove a probation violation by a preponderance of the evidence. Ind. Code § 35-38-2-3(e).

Williams was on probation, subject to several conditions. One required that she not consume illegal drugs. Williams provided two urine samples on different dates, and testified to irregularities with both collection procedures. Contradicting Williams's testimony, a probation officer testified that after Williams spilled an entire sample, she urinated again. Based upon the testing of the urine samples, a toxicologist concluded that Williams had consumed cocaine while on probation.

The trial court found, by a preponderance of the evidence, that Williams consumed

cocaine while on probation. We decline to reweigh the evidence. We conclude that there was sufficient evidence to find that Williams violated the terms of her probation.

## II. Statutory Authority to Order Execution of Previously Suspended Sentence

Upon finding that a person has violated probation, a trial court may “order execution of all or part of the sentence that was suspended at the time of the initial sentencing.” Ind. Code § 35-38-2-3(g). This is true regardless of whether the Notice of Violation is filed during the probationary period or within forty-five days of receiving notice of the violation. I.C. § 35-38-2-3(a), (g), (i).

Williams asserts a series of errors with respect to the trial court’s consideration of the first Notice of Violation, alleging non-payment of restitution. We note, however, that Williams filed her Notice of Appeal eleven months after the trial court’s order on the alleged violation. A party has thirty days to appeal a final judgment. Ind. Appellate Rule 9(A)(1). A judgment revoking probation is a final appealable order. I.C. § 35-38-2-3(k). Beyond thirty days, the party forfeits the right to appeal, except as provided by post-conviction remedies. App. R. 9(A)(5). This is a direct appeal, not a petition for post-conviction relief. Accordingly, in this appeal, Williams cannot allege error with respect to the first Notice of Violation.<sup>3</sup>

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<sup>3</sup> Among other things, Williams argues that the trial court did not find that her non-payment was willful. The United States Supreme Court has held that a sentencing court must inquire into the reasons for the failure to pay. *Bearden v. Georgia*, 461 U.S. 660, 664, 672 (1983) (noting that the United States Supreme Court “has long been sensitive to the treatment of indigents in our criminal justice system”). The parties agree that Williams admitted non-payment, but the Record does not contain the terms of that admission or a transcript of the hearing in which it was considered. We note this issue with interest, especially in light of the trial court’s order that Williams, a single mother with one dependent child, a high school education, and a record of two felonies, pay almost \$9000 in costs, fees, and restitution.

## Conclusion

There was sufficient evidence to find, by a preponderance of the evidence, that Williams consumed cocaine while on probation. Further, based upon this finding, the trial court had statutory authority to order execution of the previously suspended sentence.

Affirmed.

VAIDIK, J., and BARNES, J., concur.

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For Indiana authority on this issue, see I.C. § 35-38-2-3(f); Champlain v. State, 717 N.E.2d 567, 571 (Ind. 1999) (affirming revocation where defendant failed to pay victims \$10,000, while holding a \$6000 retirement fund and giving parents his house); Barnes v. State, 676 N.E.2d 764, 765 (Ind. Ct. App. 1997) (affirming revocation where defendant failed to pay \$255.02 in 18 months); Bahr v. State, 634 N.E.2d 543, 545 (Ind. Ct. App. 1994) (affirming revocation where the trial court held two hearings inquiring into the reasons for the probationer's failure to pay); and Garrett v. State, 680 N.E.2d 1, 2-3 (Ind. Ct. App. 1997) (reversing revocation where the trial court failed to ascertain defendant's capacity to pay).